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March 14, 2003  
DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal  
Date of Filing: February 13, 2003  
Case No.: TIA-0021

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits on behalf of XXXXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the worker, a uranium miner, was not a "DOE contractor employee" and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

*I. Background*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. See 42 U.S.C. § 7384(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the

Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. 2210 note. See 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to oppose a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE program is limited to DOE contractor employees because DOE and DOE contractors would not be present as parties in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. See 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers readers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069.

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1/ See [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy).

2/ See Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations. The application states that the worker was a uranium miner from 1958 to 1985. The application further states that the worker was employed by two companies - Phillips Petroleum Co. and Kerr-McGee.

In response to the application, the DOE Office of Worker Advocacy determined that the worker was not a DOE contractor employee. See December 6, 2002 letter from the Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for the physician panel process.

In her appeal, the applicant does not directly address whether the worker was a DOE contractor employee. Instead, she states that the worker contracted lung disease as the result of his work in the uranium mines and that he qualifies for RECA compensation under the amended standards.

Upon our receipt of the appeal, we wrote to the applicant, advising her that we had received the appeal. In response to her statement that she believed that the worker qualified for a RECA benefit under the amended, lower radiation exposure standards, we provided her with the toll free number at the Department of Justice for RECA claims.

## *II. Analysis*

### *A. Worker Programs*

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions.

Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the physician panel process.

#### B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As explained above, the physician panel process is limited to "DOE contractor employees." As explained below, employees of uranium mining companies are not DOE contractor employees.

##### 1. The Uranium Mining and Milling Industry

A 1982 DOE report describes the history of the uranium industry in the United States. See "Commingled Uranium-Tailings Study," DOE/DP-0011, vol. II (June 30, 1982), App. D ("History of the [Atomic Energy Commission] Domestic Uranium Concentrate Procurement Program") (hereinafter the 1982 DOE Report). The report concerns the fact that uranium mills sold uranium concentrate to both the federal government and other entities, and that the federal government was responsible for paying a share of the environmental remediation costs based on the amount of its purchases. By way of background, the report describes the development of the nation's uranium mining and milling industry.

The 1982 DOE report describes the period 1947 to 1970, when the DOE's predecessor, the Atomic Energy Commission (AEC), purchased uranium ore and concentrate from private firms. The report states that its first contract, executed in 1947, was for the purchase of uranium concentrate from Vanadium Corporation of America. The report indicates that, with the exception of a mill in Utah, the mines and mills were privately operated. <sup>3/</sup> In 1962, the AEC stopped purchasing uranium ore. 1982 DOE Report at D-4. Aside from the uranium procurement program, the AEC leased federal lands

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<sup>3/</sup> The AEC purchased a Monticello, Utah mill in 1948. 1982 DOE Report at D-6.

to private firms in exchange for a royalty share of any production. In 1962, the AEC discontinued the leasing program. 1982 DOE Report at D-7.

2. Whether the Worker was a "DOE Contractor Employee"

The term "Department of Energy contractor employee" is defined in relevant part as:

An individual who is or was employed at a Department of Energy facility by -

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 73841(11)(B); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). A "Department of Energy facility" is defined in relevant part as:

[A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located -

(A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy ... and

(B) with regard to which the Department of Energy has or had -

(i) a proprietary interest; or

(ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction or maintenance services.

42 U.S.C. § 73841(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Although the DOE's published list of DOE facilities does not include any uranium mining or milling sites, 67 Fed. Reg. 79,069-79,074, those sites would be DOE facilities if they met the statutory and regulatory definition.

The 1982 DOE Report indicates that, with the possible exception of employees at the AEC's Utah mill, uranium mine and mill workers were not "DOE contractor employees." In order to be a DOE contractor employee, the employee must work for a firm that has a contract to provide "management and operating, management and integration, environmental remediation," or other "services" at a DOE facility. Neither the AEC procurement contracts nor the AEC mine leases required the contractor to provide services. Under the AEC procurement contracts, the contractor sold product to the AEC. Under the mine leases, the contractor paid a royalty-in-kind on ore production in exchange for a leasehold interest. Since the AEC procurement contracts and the leases were not contracts for services, the firms that entered into those contracts did not have the type of contracts that would make them DOE contractors, let alone contractors performing work at a DOE facility. Accordingly, their workers, including the uranium miner in this case, do not meet the definition of a "DOE contractor employee." See *Worker Appeal*, 28 DOE ¶ \_\_\_\_\_, Case No. TIA-0007 (2003); *Worker Appeal*, 28 DOE ¶ \_\_\_\_\_, Case No. TIA-0006 (2003); *Worker Appeal*, 28 DOE ¶ 80,624, Case No. TIA-0002 (2003).

As the foregoing indicates, the worker was not a DOE contractor employee and, therefore, the applicant is not eligible for the DOE physician panel process. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0021 be, and hereby is, denied.

(2) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: March 14, 2003

